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**Interinstitutional Agreements:
Forms and Constitutional Limitations**

FRANCIS SNYDER

European University Institute, Florence

EUROPEAN UNIVERSITY INSTITUTE



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DEPARTMENT OF LAW

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BADIA FIESOLANA, SAN DOMENICO (FI)

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FOREWORD

This paper was originally written as a contribution to a research project on 'The Hierarchy and Sources of EC Law', directed by Prof.Dr. Gerd Winter, Zentrum für Europäische Rechtspolitik (ZERP) an der Universität Bremen, and financed by the European Parliament. It will also appear in a collective publication: Gerd Winter (ed.), Reforming the Categories and Hierarchy of EC Legal Acts, to be published in 1995. The author wishes to express his gratitude to the editor for his kind permission to publish the paper in the EUI Working Papers series.

INTERINSTITUTIONAL AGREEMENTS: FORMS AND CONSTITUTIONAL LIMITATIONS

FRANCIS SNYDER*

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I INTRODUCTION

The legal system of the European Union (EU)¹ embraces numerous types of norms. Some of these norms are legally binding, while others have legal effects of a different kind or are without legal force. This second group of norms comprises 'rules of conduct which, in principle, have no legally binding force but

* Professor of European Community Law, European University Institute, Florence; Professor of Law, College of Europe, Bruges; Honorary Visiting Professor of Law, University College London. The author wishes to thank Vassil Breskovski, Emir Lawless, Wolf Sauter, Anne-Lise Strahtmann, Angela Ward and Gerd Winter for their contributions to this paper. He alone of course is responsible for its content and conclusions.

¹ The expression European Union (EU) is used here to denote the ensemble established by the Maastricht Treaty. The expression European Community (EC) is used, where necessary, to denote the EC specifically.

which nevertheless may have practical effects'.² It thus constitutes EU soft law.

EU soft law varies enormously in character. It ranges from specific acts such as recommendations as provided in Article 189 EC to very general Commission communications which serve as statements of legal policy. While most of these acts are the product of a single institution or author, some are generated by two or more EC or European Community (EC) institutions acting together. The latter are commonly known as interinstitutional agreements or joint declarations.

Though not provided in Article 189 EC, interinstitutional agreements have long been used in the EC. In recent years, however, they have increased rapidly in number. Not only have they been employed as a means of establishing basic institutional arrangements and stating fundamental values. They also raise significant issues of EU constitutional law, which should be addressed at the 1996 Intergovernmental Conference.

This report examines these interinstitutional agreements and joint declarations and the main legal issues raised by their use. For the sake of convenience, the expression 'interinstitutional agreement' is used to denote acts which are designated formally either as an 'interinstitutional agreement' or as a 'joint declaration'.

The report is divided into five main parts. The next part (II) provides a

² Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', (1993) 56 *Modern Law Review* 19 at 32. For a more detailed definition, emphasising the intention of the drafters of the norms, see Wellens and Borchardt, 'Soft Law in European Community Law', (1989) 14 *ELRev* 267 at 285, 296.

chronology and an overview of examples of agreements. The following part (III) considers alternative ways of classifying agreements and proposes a set of criteria designed to produce a coherent typology. A subsequent part (IV) analyses the extent to which interinstitutional agreements are legally binding or have legal effect. A following part (V) sets forth briefly some relevant constitutional requirements and limits. The final main part (VI) advances some proposals for reform. A brief conclusion (VII) summarises the discussion.

II CHRONOLOGY AND OVERVIEW OF EXAMPLES

It is difficult to know the number of interinstitutional agreements exactly. What counts as an interinstitutional agreement, especially in the past, is not always clear; not all agreements have been published in the Official Journal; and no comprehensive list of agreements seems ever to have been compiled.³ In addition, the academic literature on the subject reflects the characteristics of interinstitutional agreements themselves: it is on the whole relatively recent, rather sparse, and far from encyclopaedic in coverage.⁴ Nevertheless, by

³ In 1973 a Commission communication gave a list of agreements between the Commission and the European Parliament: see Commission of the European Communities, 'Mesures pratiques destinées à réaliser le renforcement des pouvoirs de contrôle du Parlement et à améliorer les rapports entre cette Institution et la Commission', Communication de la Commission, 30 mai 1973, COM(73)999 (1973), Annex I. Quite apart from the fact that this list is limited solely to agreements between the European Parliament and the Commission, there is no way of verifying whether the list is comprehensive or not, and in particular whether it includes all agreements ever entered into between the two institutions or simply those which were in operation in 1973.

⁴ Among sources dealing with more than one agreement, the following (in chronological order) are the most useful for the present purposes: Vergès, 'De quelques méthodes de développement institutionnel des Communautés européennes', in Mélanges offerts à Paul Reuter. Le droit international: unité et diversité, Paris, Pedone, 1980, pp 501-517; Jacqué, 'La pratique des institutions communautaires et le développement de la structure

combining these various sources, it is possible to present a rough chronology and to gain an overview of interinstitutional agreements. A list of interinstitutional agreements to date is given in the Appendix.

The earliest agreements were very informal in origin and expression.⁵ They derived mostly from an exchange of letters or a letter or a declaration in response to a claim, usually by the European Parliament to participate in decision-making. Examples include:

- the 'Luns' procedure concerning European Parliament participation in the conclusion of association agreements,⁶
- the 'Westerterp' procedure concerning European Parliament participation in the conclusion of commercial agreements,⁷

institutionnelle communautaire', in R. Bieber and Georg Ress (Hrsg.), Die Dynamik des Europäischen Gemeinschaftsrechts / The Dynamics of EC-law, Baden-Baden, Nomos, 1987), pp 377-406; Waelbroeck, M. and D. Waelbroeck, 'Les "déclarations communes" en tant qu'instruments d'un accroissement des compétences du Parlement européen', in Jean-Victor Louis and Denis Waelbroeck (sous la direction de), Le Parlement européen dans l'évolution institutionnelle, Brussels, Editions de l'Université de Bruxelles, 1988, pp 79-103; Bieber, Das Verfahrensrecht von Verfassungsorganen, Baden-Baden, Nomos, 1992); Wellens and Borchardt, 'Soft Law in European Community Law', (1989) 14 ELRev 267; Bieber, 'The Settlement of Institutional Conflicts on the Basis of Article 4 of the EEC Treaty', (1994) 31 CMLRev 505; Monar, 'Interinstitutional Agreements: The Phenomenon and its New Dynamics after Maastricht', (1994) 31 CMLRev 693; Reich, 'La mise en oeuvre du Traité sur l'Union européenne par les accords interinstitutionnels', (1994) 375 Revue du Marché commun et le Union européenne 81.

⁵ On this phase, see especially Vergès, 'De quelques méthodes de développement institutionnel des Communautés européennes', in Mélanges offerts à Paul Reuter. Le droit international: unité et diversité, Paris, Pedone, 1980, pp 501-517; and Jacqué, 'La pratique des institutions communautaires et le développement de la structure institutionnelle communautaire', in R. Bieber and Georg Ress (Hrsg.), Die Dynamik des Europäischen Gemeinschaftsrechts / The Dynamics of EC-law, Baden-Baden, Nomos, 1987), pp 377-406;

⁶ Minutes of the Council of 24 and 25 February 1964, S/861/63 (not published). See also Simmonds, 'The Evolution of the External Relations Law of the European Community' (1979) 28 International and Comparative Law Quarterly 644 at 648.

⁷ Council Note of 16 October 1973, R/2641/73 (not published). See also Simmonds, *ibid.*

- the Commission's commitment to inform Parliament about the follow up of parliamentary initiatives,⁸
- consultation of Parliament by the Council in cases not provided for in the EEC Treaty⁹ and
- the Council's commitment to inform Parliament about the follow-up given to its opinion.¹⁰

A second phase involved the issue of joint declarations.¹¹ They were the product of three rather than only two institutions, and in one case even concerned the representatives of the Member States. Joint declarations were more formal than the early agreements, being the result of negotiation between and approval by the participating institutions, being designed usually to establish a more or less complex procedure, taking the form of a specific document, and being published in the Official Journal. Examples include:

- the Joint Declaration of 4 March 1975 of the European Parliament, the Council and the Commission on the conciliation procedure in budgetary matters,¹²
- the Joint Declaration of 5 April 1977 by the European Parliament, the Council and the Commission on Fundamental Rights,¹³
- the Joint Declaration of 30 June 1982 by the European Parliament, the Council and the Commission on various measures to improve the budgetary procedure,¹⁴ and
- the Joint Declaration of 11 June 1986 by the European Parliament, the Council,

⁸ Embodied in a letter of 3 March 1984; see Jacqué, *ibid.* at 388.

⁹ Based on a declaration of the chairman of the Council; see also Jacqué, *ibid.* at 389.

¹⁰ Based on letters of the chairmen of the Council; see Jacqué, *ibid.* at 389.

¹¹ On this phase, see especially Jacqué, 'La pratique des institutions communautaires et le développement de la structure institutionnelle communautaire', in R. Bieber and Georg Ress (Hrsg.), Die Dynamik des Europäischen Gemeinschaftsrechts / The Dynamics of EC-law, Baden-Baden, Nomos, 1987), pp 377-406; and Waelbroeck, M. and D. Waelbroeck, 'Les "déclarations communes" en tant qu'instruments d'un accroissement des compétences du Parlement européen', in Jean-Victor Louis and Denis Waelbroeck (sous la direction de), Le Parlement européen dans l'évolution institutionnelle, Brussels, Editions de l'Université de Bruxelles, 1988, pp 79-103.

¹² OJ 1975 C89/1.

¹³ OJ 1977 C103/1.

¹⁴ OJ 1982 C194/1.

the Representatives of the Member States meeting within the Council, and the Commission on Racism and Xenophobia.¹⁵

A third phase involved the conclusion of interinstitutional agreements or declarations. Examples include:

- the Inter-institutional Agreement of 29 June 1988 between the European Parliament, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure,¹⁶

- the Interinstitutional Declaration of 25 October 1993 of the European Parliament, the Council and the Commission on democracy, transparency and subsidiarity,¹⁷

- the Interinstitutional Agreement on procedures for implementing the principle of subsidiarity,¹⁸

- the Decision of the European Parliament on the regulations and general conditions governing the Ombudsman's duties,¹⁹

- the Arrangements for the proceedings of the Conciliation Committee under Article 189B regarding the co-decision procedure,²⁰

- the Interinstitutional Agreement of 29 October 1993 of the European Parliament, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure,²¹ and

- the Interinstitutional Agreement of 20 December 1994 of the European Parliament, the Council and the Commission on the consolidation of Community law, concluded at the Interinstitutional Conference.²²

¹⁵ OJ 1986 C158/1.

¹⁶ OJ 1988 L185/33. This was the first use of the designation 'interinstitutional agreement'; it was published in the L series of the Official Journal.

¹⁷ OJ 1993 C329/133, also in Europe, no. 1857, 4 November 1993, p 1.

¹⁸ OJ 1993 C329/135: the reference is to the draft Agreement which is to be adopted by each institution according to its internal procedures.

¹⁹ OJ 1993 C329/136: the reference is the draft decision to be adopted by each institution according to its internal procedures.

²⁰ OJ 1993 C329/141.

²¹ OJ 1993 C351/1.

²² See Europe, no. 6402 (n.s.), Friday 20 Jan 95 p 12; see also European Parliament, Committee on Legal Affairs and Citizens' Rights, Report on an interinstitutional agreement on official codification of Community legislation (Rapporteur: Jean-Pierre Cot) (European Parliament, Session Documents, PE 211.041/fin., 12 January 1995).

Of these agreements, the 29 June 1988 Agreement on budgetary discipline followed the entry into force of Single European Act, while the others were adopted to implement the Maastricht Treaty. Again, these agreements involved the three principal non-judicial institutions, and they were mainly formal in character. Virtually all shared the distinctive feature that they were intended expressly to implement specific Treaty provisions, namely the institutional reforms in the Maastricht Treaty on European Union.

Amidst the current proliferation of interinstitutional agreements, a number of agreements are still at draft and negotiation stage. They include:

- the Draft Interinstitutional Agreement on the rules for implementing [the conciliation committee in the co-decision procedure],²³
- the proposed Interinstitutional Agreement aimed at making the Treaty revision procedure more democratic and more transparent,²⁴
- the Commission proposal of 11 May 1992 for a Joint Declaration in respect of the Intellectual Property Aspects of Scientific and Technological Cooperation Agreements with Third Countries,²⁵
- the draft interinstitutional agreement of December 1993 sent by the European Parliament to the Council and the Commission on the implementation of the Common Foreign and Security Policy,
- the draft interinstitutional agreement of December 1993 sent by the European Parliament to the Council and the Commission on the application of Title VI TEU (Cooperation in the fields of Justice and Home Affairs), and
- the draft interinstitutional agreement of December 1993 sent by the European

²³ European Commission, SEC(94)645 final, Brussels, 19.4.94

²⁴ See *Europe*, no. 6413 (ns), 4 February 1995, p 4.

²⁵ Commission of the European Communities, Proposal for a Joint Declaration of the Council and the Commission in respect of negotiations concerning the IPR aspects of agreements for scientific and technological cooperation between the European Community and third countries, Communication from the Commission to the Council, COM(92)202 final (Brussels, 11 May 1992).

Parliament on the implementation of Economic and Monetary Union.²⁶

III TYPOLOGY

In order to be able to assess these agreements from a constitutional standpoint, it is helpful to classify them according to a coherent typology. It has been remarked that '[t]hese quasi-constitutional instruments are difficult to classify in law. They are unlikely to fall into a single legal category. The circumstances of each case form the only basis on which to determine whether the States or the institutions really intended to enter into a legal commitment or whether they had no objective other than to publish a declaration of political intent and lay down guidelines'.²⁷ Today, however, it is time to determine the criteria for classifying these agreements; this exercise is neither *ad hoc* nor futile. Now there are more agreements on the basis of which to arrive at a classification scheme. In addition, the proliferation of agreements, together with the increasing complexity of the EU legal system, have rendered the question of their constitutional and legal status more acute.

²⁶ On the last three, see Monar, 'Interinstitutional Agreements: The Phenomenon and its New Dynamics after Maastricht', (1994) 31 CMLRev 693 at 716-718. See also, e.g., European Parliament, Report of the Committee on Institutional Affairs on the conclusion and adaptation [sic] of interinstitutional agreements (Rapporteur: Mr Panayotis Roumeliotis), European Parliament, Session Documents, A3-0043/93, 2 February 1993; European Parliament, Report of the Committee on Civil Liberties and Internal Affairs on participation by the European Parliament in international agreements by the Member States and the Union on cooperation in the fields of justice and home affairs (Rapporteur: Mr Georg Jarzembowski), European Parliament, Session Documents, A3-0436/93, 21 December 1993.

²⁷ Bernhardt, 'The Sources of Community Law: The 'Constitution' of the Community', in Commission of the European Communities, *Thirty Years of Community Law*, Luxembourg, Office of Official Publications of the European Communities, 1983, pp 69-82 at 79.

Among the possible criteria for classifying agreements are (a) formal designation, (b) identity of the participating institutions, (c) when the agreement was made, (d) subject matter, (e) legal basis and (f) intention of the participating institutions with regard to legal effect, supplemented if necessary by other factors. Each criterion may be briefly evaluated.

(a) The formal designation, while not irrelevant, is the least useful criteria. Early agreements often had no formal designation, while subsequently the designations 'joint declaration' and 'interinstitutional agreement' were used seriatim and without regard for example to the fact that the designation 'joint declaration' also covered a host of other, quite different accords. Of equal importance from the constitutional standpoint, the formal designation of an act is not determinative of its nature even in the case of legally binding EC acts.²⁸

(b) The identify of the participating institutions is also of little importance in distinguishing between agreements within the broad category of EU soft law being considered here. All three main legislative institutions, namely the European Parliament, the Council and the Commission, are involved in almost all agreements except for the early ones.

(c) The criterion of when an agreement was made emphasises the relation of a text to the different phases of EC/EU development.²⁹ As already seen, it points to important, if not determinative features, of specific historical contexts. It does not however provide a convincing basis for distinguishing among

²⁸ See Case 41-44/70 International Fruit Company v Commission [1971] ECR 411.

²⁹ Cf Monar, 'Interinstitutional Agreements: The Phenomenon and its New Dynamics after Maastricht', (1994) 31 CMLRev 693 at 696.

agreements which might help us to assess their constitutional implications at the present time.

(d) If subject matter is used as a criterion, almost half of the total current or proposed agreements (11 out of 24) concern legislative procedure. The next largest category (4) concerns the budgetary procedure; it can be seen as a subset of the first category. This criterion thus reveals lacunae in the EU system, as perceived by the European Parliament. The main initiator of agreements, the European Parliament has used soft law to improve an institutional position which from the standpoint of hard law was weak or severely constrained.³⁰ Nevertheless, subject matter is too blunt a criterion to group the agreements into coherent categories. In addition, its constitutional relevance is limited unless subject matter refers expressly or implicitly to another criterion such as legal basis or whether the subject matter is substantive or procedural in nature.

(e) Legal basis as a criterion may be taken in either of two senses. On the one hand, agreements may be classified into different groups if they are based on different articles of the Treaty; this is legal basis in the sense of the duty to state reasons as required by Article 190 EC. On the other hand, agreements may be classified into different groups according to whether they derive directly from a Treaty provision or not; this refers to whether or not the Treaty provides, more or less expressly, for the conclusion of an agreement to achieve a specific

³⁰ As stated by Alman Metten MEP in the debate on the Roumeliotis report, 'honesty requires us to admit that when we talk about interinstitutional agreements ... we are talking about things that we would have preferred to see dealt with in the Community Treaties themselves. As far as we are concerned, therefore, these agreements are an attempt to retrieve what we have unfortunately been unable to make legally binding, because we have never been a genuine partner in the negotiations on the drafting of the Treaties.' See Debates of the European Parliament, 1993/94 Session, Sitting of 11 March 1993, OJ, Annex No 3-429/251.

purpose.

For the present purposes, the first sense is not useful because most of the agreements would be outside a classification scheme based upon it. With regard to the second sense, however, a recent writer has argued that it is an appropriate criterion for classifying interinstitutional agreements.³¹ He suggests that there are two groups of agreements: those provided for explicitly by Treaty provisions, and those which lack an express Treaty basis. On this ground, he draws tentative conclusions regarding the legal status of the agreements. In his view, agreements in the first group constitute hard law, in that they are 'legally binding'³² or 'fully binding under Community law (hard law)'.³³ Those in the second group have a legal status somewhere "'in between" a mere political undertaking and a plain legal obligation (soft law).'³⁴

Though such a political analysis can be extremely fruitful, it may be suggested that its tentative conclusions could usefully be revised from a legal standpoint. It may also suggested that what counts as 'legally binding' or 'fully binding under Community law' is a highly complex concept, even for those acts which are expressly provided in Article 189 EC. This is not to mention, for example, the case law of the European Court of Justice with regard to the effectiveness of EC law,³⁵ or the differentiated types of acts which may be taken within the

³¹ Monar, 'Interinstitutional Agreements: The Phenomenon and its New Dynamics after Maastricht', (1994) 31 *CMLRev* 693 at 687-703.

³² *Ibid.* at 697.

³³ *Ibid.* at 703.

³⁴ *Ibid.* at 703, see also 699.

³⁵ See Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', (1993) 56 *Modern Law Review* 19.

framework of the EC Treaty regarding Economic and Monetary Union.³⁶

It may further be suggested that the example of the internal rules of procedure of the EC/EU institutions provides a useful analogue for purposes of comparison.³⁷ These internal rules are based expressly on the Treaty, but they do not always have legal force in the sense of imposing legal obligations *erga omnes*. Nor can they always be relied upon as a sword in the European courts, and it is unlikely that they would all be subject to an Article 173 EC action for annulment. Instead, as the European Court of First Instance has held:

'It is necessary to distinguish between those provisions of an institution's Rules of Procedure whose infringement may not be relied upon by natural and legal persons because they are concerned solely with the internal working arrangements of the institution and cannot affect their legal situation and those whose infringement may be relied upon because ... they create rights and are a factor contributing to legal certainty for such persons.'³⁸

With these factors in mind, it would appear that the legal basis, in the sense of whether the use of an agreement is provided more or less expressly by the Treaty or not, is not entirely satisfactory as a criterion for classifying agreements.

(f) Instead it may be suggested that a suitable criterion consists of the intention

³⁶ See Snyder, 'EMU -Metaphor for European Union? Institutions, Rules and Types of Regulation', in R. Dehousse (ed), Europe after Maastricht: An Ever Closer Union?, Munich, Law Books in Europe, 1994, pp 63-99.

³⁷ Especially since it may be argued that the legality of interinstitutional agreements 'can be derived from the power of each institution to adopt rules of procedure': see Winter, 'Introduction', in G. Winter (ed), Reforming the Category and Hierarchy of EC Legal Acts [draft, typescript at 8].

³⁸ Joined Cases T-79/89, T-84-86/89, T-91-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 BASF AG and others v Commission [1992] ECR II-315 [para 78].

of the drafters, supplemented as necessary in specific cases by the requirement of judicial review. The 'intention of the drafters' refers to the intention of the signatory institutions with regard to the legal force, if any, of the agreement and the extent and nature of its legal effects. The supplementary factor is meant to encompass the possibility that, regardless of the intention of the drafters, the agreement may in specific instances create rights, impose obligations or have other legal effects, for example with regard to third parties; such instances should not be limited to the intention of the drafters and instead should be delimited as necessary by judicial review. Thus interinstitutional agreements may have (or lack) legal effects which require to be determined in each instance by considering the intention of the signatory institutions, viewed in the light of the case law of the European courts.

This criteria is attractive for several reasons. First, it is consistent with the emphasis on the intention of the drafters or signatories which is fundamental importance in public international law. The latter, in turn, forms part of the legal substratum of EU law, especially with regard to soft law.³⁹

Second, it adapts the classic public international law test to the specific features of the EU system, in particular the role of the individual and the unique status of the European Courts. These factors help to distinguish the EU from most if not all other treaty-based legal orders.

Third, this criteria permits an analysis to be made in each specific case concerning such issues as to whether (a) an agreement is legally binding in the

³⁹ See, e.g., Wellens and Borchardt, 'Soft Law in European Community Law', (1989) 14 ELRev 267.

sense that it has legal force as between the signatory institutions, (b) specific provisions of the agreement create legal effects vis-à-vis third parties and what legal effects are involved, (c) the failure on the part of the signatory institutions to follow a provision of the agreement can be challenged by a third party, (d) either specific provisions or the agreement as a whole can be the subject of an action of annulment by a third party, and (e) the agreement by itself can serve as a basis for reviewing the legality of other EU or EC acts. These issues are analytically distinct, and it may be suggested that they are best analysed separately.

IV LEGAL EFFECTS

To have legal effects does not necessarily mean to be legally binding erga omnes, in the sense of an EC regulation or of a law in the popular sense of the word. The two poles of the spectrum may be illustrated by reference to the case law of the European Court of Justice. It is important to bear in mind that not all agreements have been discussed by an advocate-general or by the Court itself. Even when an agreement is mentioned, the question of its legal effects, if any, is usually not addressed directly.

At one extreme is the 1977 Joint Declaration on Fundamental Rights.⁴⁰ The European Court of Justice has treated it essentially as a restatement and reinforcement of principles the legal force of which derives from other sources,

⁴⁰ OJ 1977 C103/1.

and thus without really any independent legal effects of its own.⁴¹ It thus serves mainly as a source of information and an aid to interpretation of legally binding acts.⁴²

At the other extreme are agreements concerning the budgetary procedure, which are the agreements most frequently discussed in the case law so far. For example, with regard to the Joint Declaration of 30 June 1982, the European Court of Justice has stated that 'the problems regarding the delimitation of non-compulsory expenditure in relation to compulsory expenditure are the subject of an interinstitutional conciliation procedure set up by the Joint Declaration ... and ... are capable of being resolved in that context.'⁴³ In a later case Advocate-General Mancini concluded that:

'documents of that type: ... (b) express the general principle according to which Community institutions are bound by a duty of mutual loyalty and cooperation; (c) may, if the obligations which result from them are sufficiently precise and unconditional, achieve the status of measures intended to implement the Treaty and render any derived provisions conflicting with them subject to annulment.'⁴⁴

Note that this Declaration is relatively unlegalistic in its language.

⁴¹ Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727 at 3745 [para 15]; Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651 at 1682 [para 18].

⁴² See also Rudolf Bernhardt, 'The Sources of Community Law: The 'Constitution' of the Community', pp 69-82 in Commission of the European Communities, Thirty Years of Community Law, Luxembourg, Office of Official Publications of the European Communities, 1983 at 80.

⁴³ Case 34/86 Council v European Parliament [1986] ECR 2155 at 2212 [para 51].

⁴⁴ Case 204/86 Greece v Council [1988] ECR 5323 at 5349. See also his observations on the 1982 Joint Declaration in Case 34/86 Council v European Parliament [1986] ECR 2155 at 2186-2187.

In contrast, the 1988 Interinstitutional Agreement on budgetary discipline states *inter alia* that 'budgetary discipline under the Interinstitutional Agreement ... is binding on all the institutions involved for as long as the Agreement is in force'.⁴⁵ A budgetary expert (not a lawyer) describes it as having given 'une base contractuelle à la mise en oeuvre du droit budgétaire européen; il constitue le véritable cadre de l'exercice du pouvoir budgétaire au sein de la Communauté.' He concludes nevertheless that the Agreement 'n'a pas de véritable portée juridique'; it cannot replace the Treaty provisions, which provide the framework within which the Agreement operates and without which it would lack real effect.⁴⁶ It may be suggested, however, that an agreement, in particular this one, may operate on the basis of and within the framework of Treaty provisions and at the same time should be recognised as having legal force in the sense of being legally binding upon, and legally enforceable among, the signatory institutions.

It thus may be suggested that to have legal effects may imply any or all of the following: (a) to express general principles of EU or EC law, (b) to provide a normative focus for argument and conflict,⁴⁷ (c) to provide a normative (and potentially legal) framework for negotiations,⁴⁸ (d) to create expectations of conduct⁴⁹ which may constrain institutional discretion and in some cases create legitimate expectations in the legal sense on the part of other signatory institutions, (e) to concretise the duty of interinstitutional cooperation as derived

⁴⁵ Paragraph I Basic Principles of the Agreement, subpara 3, OJ 1988 L185/33.

⁴⁶ Terrasse, *Le budget de la Communauté européenne*, Paris, Masson, 1991, at 14 [original emphasis omitted].

⁴⁷ Terrasse, *Le budget de la Communauté européenne*, Paris, Masson, 1991, at 68.

⁴⁸ Cf. Wellens and Borchardt, 'Soft Law in European Community Law', (1989) 14 *European Law Review* 267 at 311.

⁴⁹ Cf. *ibid.* at 312.

from Article 4 EEC: (f) to supply rules which are legally binding upon and between the signatory institutions,⁵⁰ (g) to meet the threshold of locus standi and thus provide a basis for judicial review, (h) to be capable of being the object of an action for annulment under Article 173 EC, (i) to be capable of being used as a sword or a shield in litigation, (j) to serve as source of information and an aid in judicial interpretation, (k) to be part of the acquis communautaire,⁵¹ or (l) to create legal rights and obligations for third parties not signatories to the agreement. In many instances, as with the 1975 Joint Declaration on conciliation procedure, the act may operate satisfactorily as a matter of political practice while at the same time its legal effects are the subject of disagreement.⁵²

VI CONSTITUTIONAL REQUIREMENTS AND LIMITS

The increasing use of interinstitutional agreements is due partly to structural factors of the EU system, such as the lack of a clear division of power or detailed rules governing relations among institutions.⁵³ It also stems however from conjunctural factors, such as the partial merger of the concepts of subsidiarity and proportionality in the interpretation given to the concept of subsidiarity by the EU institutions following the signing of the Maastricht

⁵⁰ Cf. *ibid.* at 315.

⁵¹ Cf. *ibid.* at 310.

⁵² See A. C. Oosterman-Meulenbeld, 'Die concertatie procedure en het Europese Parlement', (1986) NJB 1986 742, and Bothe 'Soft law in den Europäischen Gemeinschaft' in *Festschrift für Hans-Jürgen Schlochauer*, W. de Gruyter, Berlin, 1981, pp 761-775 at 767, cited in Wellens and Borchardt, 'Soft Law in European Community Law', (1989) 14 *European Law Review* at 317-318.

⁵³ For an early view, see J. Megret et al, *Le droit de la Communauté économique européenne*, vol. 9. *L'Assemblée, le Conseil, la Commission, le Comité économique et social*, Editions de l'Université de Bruxelles, Brussels, 1979, esp. pp 15-21, 350-353.

Treaty.⁵⁴ Together these factors raise serious constitutional problems. They include not only the 'paradox of subsidiarity'⁵⁵ but also the extent to which interinstitutional agreements are subject to clear constitutional requirements and limits.⁵⁶

The institutions signatory to interinstitutional agreements are subject to the basic principles expressed in and derived from the basic Treaties. In addition, the agreements themselves must be consistent with these principles.

First, in concluding agreements and in making them operate in practice the signatory institutions are subject to the duty of loyal cooperation expressed in Article 5 EC.⁵⁷

Second, and consequently, interinstitutional agreements cannot modify the basic Treaties or secondary legislation. As stated by Advocate-General Mancini, 'it remains nevertheless undeniable that joint declarations and similar measures merely constitute "droit de complément" which may not derogate from primary

⁵⁴ See, in particular, Commission of the European Communities, *The Principle of Subsidiarity*, Communication of the Commission to the Council and the European Parliament, SEC(92)1990 final (Brussels, 27 October 1992); Conclusions of the Presidency, European Council in Edinburgh, 11-12 December 1992, Annex I to Part A, 'Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on European Union'.

⁵⁵ See Snyder, 'Soft Law and Institutional Practice in the European Community', in S. Martin (ed), *The Construction of Europe: Essays in Honour of Emile Noël*, Kluwer, Deventer, 1994), pp 197-225 at 202-203.

⁵⁶ For a partial discussion, see Wellens and Borchardt, 'Soft Law in European Community Law' (1989) 14 *European Law Review* 267 at 304 *et seq.*

⁵⁷ Case 204/86 *Greece v Council* [1988] ECR 5323 at 5359 [para 16].

law on pain of invalidity.⁵⁸

Third, interinstitutional agreements must be consistent with the principle of legal certainty. In particular, any rights and obligations which are granted or imposed by an agreement, whether with regard to the signatory institutions or third parties, should be clearly and unambiguously expressed. In other words, it may be suggested that, in the absence of clear language an agreement should be interpreted as being without legal force, then only secondly as creating legal obligations as between the signatory institutions, and only subsequently as creating rights and duties vis-à-vis third parties.

Fourth, assuming that the signatory institutions have expressed their intentions in sufficiently clear language, they are to be bound by the principle of legitimate expectations. In some instances also this principle may apply as regards third parties, in particular the Member States. In this respect it is important that interinstitutional agreements may be based, directly or indirectly, on Article 4 EC.

Fifth, the discretionary power of the EU institutions to conclude interinstitutional agreements is limited by the separation of powers among institutions. The Court of Justice must therefore make sure that in the context of inter-institutional cooperation the institutions do not ignore the rules of law and do not exercise

⁵⁸ Case 204/86 *Greece v Council* [1988] ECR 5323 at 5349. The same point appears to be expressed, though in a slightly different way, by Bernhardt, 'The Sources of Community Law: The 'Constitution' of the Community', pp 69-82 in Commission of the European Communities, *Thirty Years of Community Law*, Luxembourg, Office of Official Publications of the European Communities, 1983, pp 69-82 at 79.

their discretionary power in a manifestly wrong or arbitrary way.¹⁵⁹

VII PROPOSALS FOR REFORM

In the light of the preceding discussion, it is possible to advance several proposals for reform concerning interinstitutional agreements.

It may be suggested, first, that the rank of interinstitutional agreements in the hierarchy of EC acts should be clarified. This is especially important in the light of the potential changes in the relation between the supranational and the intergovernmental parts of the Maastricht Treaty, and also of the potential future enlargement of the Community.

Second, the use of interinstitutional agreements should be authorised by the Treaty with regard to specified areas, such as the budgetary procedure. The procedure for the adoption of these authorised agreements should be made clear, for example in a declaration annexed to the Treaty and/or in the institutional rules of procedure. Again with regard to these authorised agreements, the power of judicial review by the European Court or Justice should be expressly confirmed.

Third, the types of interinstitutional agreements should be clarified and, if possible, a limited number of broad categories should be defined. This definition could be provided in a declaration annexed to the Treaty. The legal

⁵⁹ Case 204/86 Greece v Commission [1988] ECR 5323 at 5359 [para 17].

effects of each category should be specified, even if only in general terms.

Fourth, in the interests of transparency and democracy a list of existing interinstitutional agreements should be compiled. It should be kept up to date by means of an obligation on the part of the institutions to maintain the file. A catalog giving a list and the full text of these agreements should be published periodically by the Official of Official Publications.

VII CONCLUSION

The reasons for the use and proliferation of interinstitutional agreements in the EU legal and political order are easy to understand. With the increasing complexity of the EU and the urgent demands for greater transparency and democracy, however, it is necessary to reconsider the legitimate role of these agreements, their different forms and the constitutional limitations on their use. This report has presented an overview of existing and proposed agreements, suggested a simple but workable typology for classifying them, and in the light of certain constitutional requirements advanced several proposals for reform. Its aim has been to contribute to the review of EU and EC acts prior to and during the 1996 Intergovernmental Conference. This review should of necessity take account not only of acts which are legally binding in the traditional sense but also of those which have more diffuse legal effects.

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